was inaccurate and could not be properly substituted for the words of the statute."

No application was made to amend the ground so as to conform to the provision of the Code. This is sufficient reason for the appeal to be disposed of. The appeal is on facts. I have perused the record and heard counsel for the appellant and the respondent. I could find no ground to interfere with the verdict. The learned magistrate dealt with the whole case very fairly and carefully. The children had certainly committed a breach of the law by riding two on a bicycle. But that did not mean that the appellant could drive his landrover from behind and without so much as a warning to knock them down. The appellant elected merely to give a statement which deprived the prosecution from testing its veracity by cross-examination. The appellant has failed to show that the learned magistrate was wrong by reason of any error, omission or irregularity which has occasioned a failure of justice. The appeal against conviction is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. HONG AH HUAT

[A.C.J. (Sharma J.) May 31, 1970]

[Muar — Criminal Revision No. 3 of 1970]

Penal Code, s. 414 — Dishonestly retaining stolen property — Possession soon after theft — Presumption — Evidence Ordinance, 1950, s. 114.

Evidence — Presumption — Possession of stolen goods — Evidence Ordinance, 1950, s. 114, illustration (a).

In this case the evidence showed that the accused had purchased stolen property from the thief. The property were found in his possession. The learned magistrate acquitted the accused as he found there was doubt in the prosecution case.

Held: as the evidence showed that the property had been stolen and that they were recovered from the possession of the accused soon after the theft, there was sufficient evidence to call on the accused for his defence on the charge under section 414 of the Penal Code and the case should be sent back for retrial.

Case referred to:-

(1) *Chevadappa Pujari & Ors.* v. *Emperor* A.I.R. 1945 Bom. 292.

CRIMINAL REVISION.

Sharma J. (delivering oral judgment): The accused was charged under section 411 of the Penal Code in Labis Magistrate's Court Arrest Case No. LA. 191 of 1969 for having dishonestly retained four spray pumps and six tins of paint having reason to believe the same to be stolen. He was also charged in the same court in Arrest Case No. 192 of 1969 for having dishonestly retained motor cycle JF 3912 having reason to believe the same to be stolen. The date of the commission of the offence as mentioned in both the charges was 4th May 1969. The time of the commission of the offence relating to Case LA. 191 of 1969 as mentioned in the charge was 3.20 p.m. at No. 27 Jalan Cheng Poh, Labis, which was the address at which the accused resided. The time of the commission of the offence relating to the case LA. 192 of 1969 was "about 4 a.m." at North Labis Estate. These two cases were tried together and the learned magistrate acquitted and discharged the accused on both the charges without calling for the defence. I had called for these files under my revisionary powers and on perusal of the record in the two cases I found that the reason given by the learned magistrate in not calling upon the accused to enter his defence was that he found that there was a doubt in the prosecution case on both the charges.

On 25th April 1969 at about 5.30 a.m. when P.W. 1, a supervisor in F.L.D.A., went for muster, his conductor, M. M. Mathews (P.W. 2) reported that the estate's store had been broken into and certain property including the spray pumps and the tins of paint removed from the store. P.W. 1 made a report at the Labis police station at about 7 a.m. Inspector Krishnan (P.W. 3) was the investigating officer in the case and he recovered the property alleged to have been stolen from or near the house of the accused. Abdul Kadir bin Rashid (P.W. 4) was produced as a prosecution witness. In his evidence he said that he was arrested in connection with the house-breaking and theft of the store at the North Labis Estate and that he, with two others, was charged in court for stealing six spray pumps and certain other articles. The other two persons who were jointly charged with P.W. 4 for house-breaking and theft were Mat Sariah and Hashim bin Chik. He further testified that the things stolen from the store of North Labis Estate were sold to the accused for $228 and that the articles were handed to the accused at 5 a.m. P.W. 4 was not cross-examined at all by the defence counsel. Mat Sariah was also produced by the prosecution as P.W. 9 and he admitted that he, P.W. 4 and Hashim bin Chik were convicted for the offence of house-breaking and theft of the spray pumps, paint and the motor-cycle. Hashim bin Chik was tendered for cross-examination by the prosecution but the defence counsel declined to cross-examine him. Undoubtedly P.W.4, P.W. 9 and Hashim bin Chik were accomplices. There was however also evidence given by P.W. 5, P.W. 6, P.W. 7 and P.W. 8. They identified the four spray pumps, Exhibits P6A, P2A, P8 & P2D.

The subject-matter of the charge in Labis Magistrate's Court Arrest Case No. LA. 191 of 1969 was, as I have said earlier, the four spray pumps and six tins of paint. P.W. 3, the investigating officer, went to the house of the accused on the night of 4th May 1969 and it was the accused himself who produced some of the spray pumps from a bush at the back of his house. The accused also led P.W. 3 to a rubber plantation at Jalan Yong Peng, Labis, and produced motor-cycle JF 3912 from among the banana plants. The six tins of paint were also found covered with leaves and it was the accused who led the investigating officer to the place from where they were recovered.

For a charge to succeed under section 411 it must be proved that the accused either dishonestly received the property or having received it honestly retained it dishonestly. So far as the charges in the two cases are concerned, they relate to dishonest retention of stolen property having reason to believe the same to be stolen. The accused had, according to the prosecution

evidence, purchased the stolen property (and this does not include the motor-cycle) for $228 from P.W. 4, P.W. 9 and Hashim bin Chik. P.W. 4 in his evidence had also stated that he had made arrangements for sale of the stolen goods with the accused and that part of his evidence has remained unchallenged. In every case under section 411 of the Penal Code two facts, namely (i) that a theft was committed and certain articles were stolen and (ii) that the stolen articles were recovered from the possession of the accused have to be established by direct evidence. This the prosecution had proved as far as the charge in case LA. 191 of 1969 was concerned. If these two facts are established and the recovery from the possession of the accused is recent, it is open to the court to presume under *Illustration* (a) of section 114 of the Evidence Ordinance that the accused is either the thief or a receiver of stolen goods. This presumption though rebuttable, when explained either by direct evidence or by the character and habits of the possessor or otherwise, is usually regarded by the jury as conclusive. The question as to what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand. It depends upon the nature of the article itself. *Wigmore* in his work on Evidence says:

"On a charge of taking goods, the fact that *A* was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this."

Dealing with the matter *Taylor* in his book on the Law of Evidence says:

"This presumption is in all cases of fact rather than of law. It is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Maule J., 'if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million of gallons of wine are stored, this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed.' "

Before section 114 can be applied it must be proved

(i) that the property is stolen;

(ii) that a person is in possession of the property; and

(iii) that this was soon after the theft.

The word "possession" implies a physical capacity to deal with a thing as we like to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having dominion over the object. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

In these two cases some of the objects were recovered at the back of the house of the accused and the motor-cycle a little distance away and it was the accused who led the police to the discovery of these articles. The production of property does not necessarily prove possession. In the case of *Chavadappa Pujari & Others* v. *Emperor*[1] Divatia J. said:

"*Illustration* (a) to section 114 is not exhaustive but only indicative of the general principle embodied in the section that in making presumptions the court should have regard to the common course of natural events and human conduct in their application to the facts of a particular case. The condition precedent for the application of the illustration is that the accused must be in possession of stolen goods. Where they are on the person of the accused, or in the houses or fields exclusively occupied by them, there can be no doubt that they must be deemed to be in their possession. But, in quite a number of cases, stolen property is produced without making any incriminating statement from a place which is not exclusively occupied by the accused or which is of the ownership of another person. In such cases a good deal depends upon whether the production was accompanied by information given by the accused in custody as would be admissible in evidence under section 27. Such information can be relied on by the prosecution as incriminating evidence against the accused along with the production or discovery of stolen property. But the production of property by itself would not necessarily prove his possession. It would at the the most show that he had knowledge where the property was kept or concealed. Thus, where it is proved that the accused made a statement to the effect that 'I have concealed the property at a particular place and I will produce it,' and if it is discovered in consequence of that statement, it would be evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession he would not have kept them at that place. Where however the accused, without stating that he had concealed stolen property, merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the accused might have merely knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of the property, its production alone from another man's property would not be sufficient to establish the accused's possession. It may at the most show his knowledge that the property was concealed there. The mere knowledge that stolen property is lying hidden somewhere is not incriminating circumstance for the offence of theft or receiving stolen property, and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish accused's possession apart from his knowledge, and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under *Illustration* (a) to section 114."

Considering the evidence led by the prosecution in Labis Magistrate's Court Arrest Case No. LA. 191 of 1969, I am of the view that the prosecution had established a *prima facie* case against the accused except for the fact that there may have been some doubt as to one of the pumps or the name of the owner referred to in the charge as one Omar bin Abu Bakar. North Labis Estate were in lawful possession of the articles stolen and the learned magistrate could easily have amended the charge by substituting the number of the pumps and the name of North Labis Estate instead of Omar bin Abu Bakar in the charge. It is not necessary that the charge should specify the name of the owner, the name of the lawful possessor of the property stolen is sufficient if specified in the charge. I will accordingly set aside the order of the learned magistrate as far as Labis Magistrate's Court Arrest Case No. LA. 191 of 1969 is concerned. I understand the magistrate has already been transferred. The case will consequently be sent back for retrial by another magistrate.

Coming now to Labis Magistrate's Court Arrest Case No. LA. 192 of 1969 I need not deal with that in detail but will only say that there was sufficient evidence to proceed against the accused under section 414 of the Penal Code. The order of the magistrate in that case is also consequently set aside with the direction that the charge be amended to one under section 414 of the Penal Code and the case sent back for retrial.

Retrial ordered.

KIONG MAN v. KISHEN

[O.C.J. (Syed Agil Barakbah J.) September 24, 1970]

[Seremban — Civil Suit No. 79 of 1963]

Land Law — Contract — Sale of land — Claim for specific performance of an agreement — Defence of non est factum — Fraud — Burden of proof.

The plaintiff claimed specific performance of an agreement for the sale by the defendant to him of certain land in Kuala Pilah. The defendant in his defence, alleged that the agreement of sale was not his deed, as he had signed it not knowing the essential nature of the contract. He also alleged that the agreement was obtained from him by fraud on the part of the plaintiff.

Held: on the facts, the defendant had failed to discharge the burden of proving *non est factum* and had also failed to prove fraud, which requires a clear and strict proof.

Cases referred to:-

(1) *Gallie* v. *Lee & Anor.* [1969] 1 All E.R. 1062.

(2) *Thoroughgood's Case* (1582) 2 Co. Rep. 9a.

(3) *Bater* v. *Bater* [1951] P. 35 at p. 37.

(4) *Tan Chye Chew & Anor.* v. *Eastern Mining and Metals Co. Ltd.* [1965] 1 M.L.J. 201.

(5) *Ratna Ammal* v. *Tan Chow Soo* [1967] 1 M.L.J. 296.

(6) *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173 at p. 175.

CIVIL SUIT.

K. D'Cruz for the plaintiff.

N. Ramachandran for the defendant.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff's claim is for specific performance of an agreement in writing entered into between him and the defendant dated 1st of July, 1960, for the sale by the defendant to the plaintiff of certain land comprised in E.M.R. 459 Lot No. 1174 situated in the mukim of Pilah, in the District of Kuala Pilah, Negri Sembilan, measuring approximately 2 acres. The plaintiff claimed as alternative relief damages for breach of contract and as further alternative relief for recission of the said contract and repayment of the deposit of $2,000 paid thereunder with interest at 6% per annum from the first day of July, 1960, until date of realisation, and for a declaration that the plaintiff is entitled to a lien on the said property for his deposit together with interest and damages and costs.

The defendant admits having signed the document dated 1st July, 1960, but avers that he did so in the belief that he was signing an agreement for a lease of a portion of his land, that he did not know what he was signing and that he did not sign an agreement or any document other than an agreement for a lease. Secondly, that he was induced to sign the said agreement by fraudulent representation of the plaintiff who well knew that such representation was false.

There are therefore two main issues of law involved. In the first place, the defendant pleads that the said document was not his deed and that he signed it not knowing the essential nature of the contract and was mistaken as to its contents. In other words, he pleads *non est factum*. Secondly, he alleges that the agreement was obtained from him by fraud on the part of the plaintiff.

The legal effect in a case of this nature is dealt with at great length by Lord Denning in the Court of Appeal of England in *Gallie* v. *Lee & Anor.*,[1] where at page 1066 he said: —

> "The case thus raises the important question: What is the effect in law when a man signs a deed, or a contract, or other legal document without reading it; and afterwards it turns out to be an entirely different transaction from what he thought it was? He says that he was induced to sign the document by the fraud of another, or, at any rate, that he was under a fundamental mistake about it. So he comes to the court and claims that he is not bound by it.
>
> In such a case, the legal effect is one of two: *Either* the deed is not his deed at all (*non est factum*): *Or* it is his deed, but it was induced by fraud or mistake (*fraud or mistake*)."

His Lordship went on to explain the difference and continued thus: —

> "There is a great difference between the two. If the deed was not his deed at all, (*non est factum*) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document. On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (*fraud or mistake*), the document is not a nullity at all. It is not void *ab initio*. It is only voidable; and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake."

In the present case the defendant is relying on both pleas. The distinction between the two is subtle and Lord Denning explained it in the same case (at page 1067) as follows: —

> "The most favoured distinction is this: If the man was mistaken as to the *class and character* to which the transaction belonged, that is to say, as to the essential nature of the transaction, it is not his document and he can rely on *non est factum*. If he was aware of its essential nature, but only mistaken as to the *contents* of the document, it is his document and he can only rely on *fraud or mistake*."

In the case under discussion, Lord Denning did not favour this distinction as being sensible on the grounds that a mistake as to contents may be just as fundamental as a mistake as to class and character His Lordship gave several illustrations in support of